

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EDITH G. BAILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

NO. 22692

BRIEF FOR APPELLEE

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JURISDICTION

The plaintiff filed this action in the United States District Court for the Eastern District of California to review an adverse decision of the United States Civil Service Commission in connection with her employment at McClellan Air Force Base, California. This appeal is taken from a summary judgment in favor of the defendant entered by the District Court on January 17, 1968.

Jurisdiction in the District Court was apparently predicated on the provisions of Title 5 U.S.C. § 704 and Title 28 U.S.C. § 1346(a)(2). Jurisdiction in this Court is invoked under Title 28 U.S.C. § 1291.





### STATEMENT OF THE CASE

On March 5, 1961, the Department of the Air Force reduced the plaintiff from the position of Newswriter GS-9 to the position of Newswriter GS-5 at McClellan Air Force Base in Sacramento, California as a result of the cancellation of her former position due to changes in workload and reductions in manpower allotments.

The plaintiff filed an appeal with the Civil Service Commission's San Francisco Regional Office on March 15, 1961.<sup>1/</sup> That appeal was denied on May 9, 1961.<sup>2/</sup> The Regional Office decision held that all procedural requirements had been met in plaintiff's case and that the action taken was under Commission regulations.

Plaintiff appealed the decision of the San Francisco Regional Office to the Commission's Board of Appeals and Review by letter dated May 16, 1961.<sup>3/</sup> In a decision letter dated June 29, 1961,<sup>4/</sup> the Board stated that the total evidence reflected that plaintiff had been properly

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- <sup>1/</sup> Enclosure 1 in Defendant's Exhibit A.
  - <sup>2/</sup> Enclosure 4 in Defendant's Exhibit A.
  - <sup>3/</sup> Enclosure 5 in Defendant's Exhibit A.
  - <sup>4/</sup> Enclosure 6 in Defendant's Exhibit A.



1964,<sup>8/</sup> plaintiff requested that the Commission's Board of Appeals and Review consider her previous representations with respect to her case to ascertain whether the Commission has any further appellate jurisdiction. By letter dated August 11, 1964,<sup>9/</sup> the Board advised plaintiff that she had no basis for further Commission review of her case and that if she desired, she could avail herself of the appropriate internal grievance procedures within her employing agency.

On February 11, 1965, plaintiff filed a petition with the United States Court of Claims. It was dismissed without prejudice on June 8, 1965. Bailey v. United States, Ct. Cl. No. 48-65. She filed a second petition with the Court of Claims on January 11, 1966, which was dismissed on December 6, 1966 for lack of jurisdiction and laches. Bailey v. United States, Ct. Cl. No. 13-66.

The present action was filed in the District Court on March 6, 1967. On January 17, 1968, the District Court entered summary judgment for the defendant on the ground of laches. From this judgment the plaintiff now appeals.

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<sup>8/</sup> Enclosure 10 in Defendant's Exhibit A.

<sup>9/</sup> Enclosure 11 in Defendant's Exhibit A.

1954. It is suggested that the Committee should  
specify and define the duties and responsibilities  
of the members of the Committee. It is suggested  
that the Committee should be authorized to  
investigate and report on the activities of  
any person or organization which is  
engaged in activities which are  
in violation of the laws of the United States  
or which are in violation of the public  
interest. It is suggested that the  
Committee should be authorized to  
conduct investigations and to  
report on the results of its  
investigations. It is suggested  
that the Committee should be  
authorized to recommend the  
appointment and removal of  
members of the Committee.

U. S. House of Representatives  
Committee on Un-American Activities  
Washington, D. C.

## ARGUMENT

THE DISTRICT COURT DID NOT ERR IN FINDING  
THAT THE PLAINTIFF'S CLAIM WAS BARRED BY  
LACHES.

The final action taken by the Civil Service Commission in plaintiff's case was on June 29, 1961, when the Board of Appeals and Review denied her appeal. She did not file the instant suit until March 8, 1967, 68 months later. The doctrine of laches has been repeatedly applied with strictness to Government employees seeking similar relief where the delay was far shorter.10/

In the District Court, the plaintiff argued that the delay in filing suit resulted from mistakenly pursuing her

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10/ See United States ex rel. Arant v. Lane, 249 U.S. 367 (1919) [20 months]; Nicholas v. United States, 257 U.S. 71 (1921) [36 months]; Norris v. United States, 257 U.S. 77 (1921) [11 months]; Corrington v. Webb, 375 F.2d 298 (9th Cir. 1967) [34 months]; Gersten v. United States, 364 F.2d 850 (Ct. Cl. 1966) [65 months]; Zuckert v. Peterson, 321 F.2d 749 (D.C. Cir. 1963) [48 months]; Chappelle v. Sharp, 301 F.2d 507 (D.C. Cir. 1961) [34 months]; Jones v. Summerfield, 265 F.2d 125 (D.C. Cir. 1959) [33 months]; Drown v. Higley, 244 F.2d 774 (D.C. Cir. 1957) [27 months]; O'Connor v. Summerfield, 239 F.2d 69 (D.C. Cir. 1956) [28 months]; Haas v. Overholser, 223 F.2d 314 (D.C. Cir. 1955) [25 months]; and Grasse v. Snyder, 192 F.2d 35 (D.C. Cir. 1951) [16 months].



remedies in the Court of Claims. Yet, as the District Court pointed out, more than 43 months passed from the final administrative action until the plaintiff first brought suit in the Court of Claims.

The plaintiff also argues in her brief on appeal that she was further pursuing her administrative remedies from March 15, 1961 through November 29, 1961 and subsequent to 1962.<sup>11/</sup> By this she is probably referring to her telegram to the President on November 24, 1961;<sup>12/</sup> the response of November 29, 1961;<sup>13/</sup> her letters of May 17, 1964 and June 29, 1964 to the Civil Service Commission;<sup>14/</sup> and the reply from the Board of Appeals and Review.<sup>15/</sup> (The plaintiff still offers no explanation for the 30 month delay between November 29, 1961 and May 17, 1964.) However, as the plaintiff was advised by the Board of Appeals and Review in their letter of November 29, 1961 and again in their letter of August 11, 1964, the decision of June 29, 1961 constituted the final administrative disposition of her case.

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<sup>11/</sup> Appellant's Brief, p. 4

<sup>12/</sup> Enclosure 7 in Defendant's Exhibit A.

<sup>13/</sup> Enclosure 8 in Defendant's Exhibit A.

<sup>14/</sup> Enclosures 9 and 10 in Defendant's Exhibit A.

<sup>15/</sup> Enclosure 11 in Defendant's Exhibit A.





"The seeking of administrative relief which is not a prerequisite to the filing of a proper suit has often been held an inadequate excuse." Gersten v. United States, 364 F.2d 850, 852 (Ct. Cl. 1966).

Similar explanations for delay in bringing suit following the final administrative disposition have repeatedly been held inadequate. Thus, in Jones v. Summerfield, 265 F.2d 125 (D.C. Cir. 1959), the plaintiff's claim was held to be barred by laches although during the 33 months before bringing suit he had written to various officials and was awaiting the results of cases filed in other courts. Also, in Grasse v. Snyder, 192 F.2d 35 (D.C. Cir. 1951) a summary judgment for the defendant on the ground of laches was affirmed despite the fact that the plaintiff was writing vitriolic letters about his discharge to various influential people during the 16 months between the final agency disposition and the bringing of suit. Similar explanations were also rejected in Drown v. Higley, 244 F.2d 774 (D.C. Cir. 1957) and Bailey v. United States, 171 F.Supp. 281 (Ct. Cl. 1959).

Finally, the plaintiff argues that her delay has not



prejudiced the Government in this action. However, as noted in Gersten v. United States, supra, at p. 852:

" . . . the longer the delay the less need there is to show, or search for, specific prejudice, and the greater the shift to the plaintiff of the task of demonstrating lack of prejudice."

As the District Court observed in its Memorandum and Order, the delay of over 68 months in this case is unreasonable on its face.

Moreover, prejudice to the Government from delay in a case of this nature results not only from the possible loss of evidence. More importantly the prejudice lies in the fact that the plaintiff seeks to recover back pay for the last seven years for a position which she has not held. Thus, in United States ex rel. Arant v. Lane, 249 U.S. 367, 372 (1919), the Supreme Court said:

"Such a long delay must necessarily result in changes in the branch of the service to which [the plaintiff] was attached, and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in



the interests of justice and sound public policy."16/

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

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16/ Cf. Bailey v. United States, supra, at p. 282, wherein the Court said:

"The Government has the right to have its services disturbed as little as possible, and the Government should not be obliged to pay the salaries of two persons for a single service due to delay over a long period of time. The Supreme Court and this court have consistently, and in a large number of cases, applied the bar of laches . . ."



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William B. Shubb

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